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No. 96-315

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM 1996

A. GUY CROUCH, III, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

1. Respondent argues that "[t]he conflict in the circuits on this issue [of the bad-faith standard versus the balancing test] is not directly presented in this case" because the holding by the court of appeals overturning the prejudice findings means that Petitioner's claim would fail even under the balancing test. (Res. 9) No doubt the question of bad-faith versus balancing would be presented more starkly if the court of appeals had upheld the prejudice findings, as it should have done. However, the courts of appeals have done so only rarely. The Ninth Circuit reported recently that, because of the "heavy burden" on the defendant in proving prejudice, it could find only one case since *Lovasco* in which a federal court of appeals had upheld prejudice findings in a pre-indictment delay case. *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992) (*citing Howell v. Barker*, 904 F.2d 889 (4th Cir.), *cert. denied*, 498 U.S. 1016 (1990)).[1] This Court has waited twenty years since *Lovasco* for a case like this one, with a well-developed record, thoughtful and divergent opinions below, and en banc consideration by seventeen judges. This Court should wait no longer.

2. Respondent incorrectly characterizes the questions presented as containing the contention that Petitioner "should be entitled to a presumption of prejudice instead of being required to show actual prejudice." (Res. 10) Petitioner does not contend that presumed prejudice, standing alone, is sufficient. As the court of appeals noted, the magistrate judge and the district court each "combined the

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[1] The only court of appeals decisions to uphold prejudice findings since *Howell* are *United States v. Foxman*, 87 F.3d 1220, 1222-24 (11th Cir. 1996) and *United States v. Sowa*, 34 F.3d 447, 450-451 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 915 (1995).

presumed prejudice with the actual prejudice and then weighed the total against the government's reasons for delay." (Pet. A-43-44 n. 25) The court of appeals held that the district court erred in "partially relying on presumed prejudice." (Pet. A-65) Petitioner asks this Court to decide whether "presumed prejudice, ***combined with actual prejudice***, shifts the burden to the government to justify pre-indictment delay." (Pet. i) (emphasis added)

3. Respondent argues incorrectly that the difference between the balancing test and the bad-faith test is "more theoretical than real." (Res. 10) Respondent illustrates its point by asserting that, unless bad faith or improper motive is shown, even "the courts that apply the balancing test have to date uniformly denied relief." (Res. 10) None of the cases cited by Respondent supports its assertion, however, because, in each of the cases the court found insufficient prejudice, which made it unnecessary to reach the balancing prong. Respondent also overlooks *United States v. Barket*, 530 F.2d 189, 194-95 (8th Cir. 1976) (in absence of bad faith, government negligence rendered delay unreasonable).[2]

Furthermore, although outcomes matter, due process is about process, too. Under the balancing test, the burden shifts to the government to justify the delay. Under the bad-faith test, the defendant has the practically impossible task of proving the improper motivation of the government, a point explained in the most recent case relied on by Respondent. *United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994). The shifting of the burden to the government "is compelled by Supreme Court precedent and by simple logic because 'once the defendant has cleared the monumental hurdle of proving

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[2] *See also State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996) (bad faith not shown but no reasonable justification for delay).

prejudice,' he would have no way of establishing the reason for the delay unless the government was required to come forward with its explanation." *Id.* (internal citation omitted). Some courts have gone so far as to say that imposition of the bad-faith standard itself can constitute a denial of fundamental fairness. *Howell*, 904 F.2d at 894 (requirement "would violate fundamental conceptions of justice, as well as the community's sense of fair play"); *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996) ("daunting, almost insurmountable, burden .... unconstitutional, unwarranted, and unfair").

In the present case, the only reason why the record includes evidence of the government's reasons for delay is that the magistrate judge made it clear that he might opt to apply the balancing test rather than the bad-faith test.[3] (Pet. C-18)

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[3] In the present case, government sought to avoid the evidentiary hearing by appealing the magistrate judge's scheduling order. The district court denied the appeal and "cautioned the government that anything but complete participation in [the] evidentiary hearing before the Magistrate Judge would not be a wise course to steer." (Pet. C-7) (footnote omitted) At the hearing on the motion to dismiss for pre-indictment delay, the magistrate judge

> clearly put the government on notice that any and all delay, not just tactical delay, might be relevant. The government was[,] therefore, cautioned, once again, to respect the seriousness of the Defendants' motion and to fully develop the record in support of its justification of the pre-indictment delay. Nonetheless, the government took [a] guarded approach, offering general excuses for delay which did not withstand cross-examination.

(Pet. C-18). When the F.B.I. agent in charge of the investigation showed an inability to remember crucial details, the Magistrate Judge

Without the balancing test, and the placing of the burden of proof on the government, no reasons for delay need be given by the government. Stonewalling would be constitutionally condoned.

4. Respondent incorrectly asserts that Petitioner has a "factual disagreement with the court of appeals' ruling" regarding the adequacy of the prejudice findings by the district court.[4] (Res. 13) The district court found that "[t]here is no significant dispute about the factual history of this litigation." (Pet. C-4) Neither the panel opinion nor the en banc opinion of the court of appeals disagreed with the district court's rendition of the facts. The controversy is over the methodology employed by the district court in reaching the conclusion that pre-indictment delay resulted in prejudice to Petitioner and the deference to be paid to the district court's conclusion.

> reminded the government that the [] balancing test could be applicable, and asked the government if it would like a recess to permit the agent time to review his files in order to respond to the detailed and important information sought by the Defendants. The government declined this invitation[,] preferring to avoid "specifics" [] about the delay.

(Pet. C-18-19).

[4] Respondent also assumes incorrectly that only Petitioner Frye and not Petitioner Crouch is contesting the court of appeals' holding regarding the adequacy of the trial court's actual prejudice findings. Petitioner Crouch's objection to the court of appeals' holding on that score is "fairly included" in his third question presented. Rule 14.1(a). To avoid any further mistake, Petitioner Crouch adopts Petitioner Frye's petition for a writ of certiorari, as Frye did Crouch's.

Respondent argued that the court of appeals "must subject this case to de novo review" because "the court's factual findings are premised on an incorrect view of the law." (Brief of Plaintiff-Appellee [sic]) 24) Petitioner argued that the district court's findings and conclusions should be upheld unless they were clearly erroneous. *United States v. Beszborn*, 21 F.3d 62, 66 (5th Cir.), *cert. denied, Westmoreland v. United States*, 115 S.Ct. 330 (1994). The panel of the court of appeals held that the district court's prejudice findings were not clearly erroneous. (Pet. B-10) The court of appeals en banc reviewed the concurrent findings by the two courts below,[5] and held the district court's prejudice findings to be clearly erroneous. (Pet. A-64) The en banc court of appeals couched its holding in the language of the "clearly erroneous" standard (Pet. A-64), but its "thorough review of each item of evidence" (Res. 13) revealed that it was undertaking *de novo* review. Respondent apparently now desires to abandon the *de novo* standard and to argue for deference to the findings and conclusions of the court of appeals.[6]

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[5] The en banc court of appeals noted the "two court" doctrine, under which this Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (Pet. A-31 n. 10 (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 2771, 275-77 (1949)).

[6] Some courts have assumed that the issue of pre-indictment prejudice is a mixed question of law and fact, not subject to a presumption of correctness. *See, e.g., Stoner v. Graddick*, 751 F.2d 1535, 1544 n. 8 (11th Cir. 1985) (analogizing to Sixth Amendment ineffective assistance cases). The approach of the en banc court of appeals below resembles the one taken in *United States v. Bartlett*, 794 U.S. 1285, 1291 n. 7 (8th Cir.) (holding was not a determination that district court's findings were clearly erroneous but rather

Only the district court is in a position to exercise the necessary "delicate judgment based on the circumstances of each case." *United States v. Marion*, 404 U.S. 307, 324 (1971). Deference to the district court's findings is especially appropriate in a case like this one, in which the district court had to make credibility determinations about the testimony of witnesses regarding lost memory and the representations of the government regarding the conduct of the investigation. The district court accepted the fourteen pages of expert testimony about memory loss and rejected the government's argument that Petitioner had been disingenuous in his assertion of memory loss.[7] (Pet. C-17) The district court also found "incredible" the prosecutor's contention that the investigation had not begun until shortly before the indictment. (Pet. C-12) The en banc opinion of the court of appeals ignored those findings, instead of deferring to them. If any court should have deference paid to its findings, it should be the district court, not the court of appeals.[8]

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was a determination that they were based on an erroneous view of the law), *cert. denied*, 479 U.S. 934 (1986).

[7] The court of appeals completely ignored the testimony by the expert witness on memory loss, the testimony by petitioner about his loss of memory, the testimony by the investigating F.B.I. agent that revealed his loss of memory, and the trial court's findings regarding memory loss. (Pet. C-17-18)

[8] A proper exercise of deference to the findings of the district court is demonstrated in *United States v. Sowa*, 34 F.3d 447 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 915 (1995). There the district court accepted the defendant's testimony that he was prejudiced by loss of memory caused by his voluntary ingestion of alcohol and drugs. The court reasoned that, "While we are unsure that, upon *de novo* review, we would find such prejudice in the case of a defendant who deliberately destroys his own memory to his detriment, we

5. Respondent disparages the cert-worthiness of the question whether the district courts should wait until after trial to decide prejudice issues and to dismiss indictments for pre-indictment delay. However, Respondent apparently believed the question to be worthy when Respondent presented it in *Lovasco*, 431 U.S. at 788 n. 7, although in an untimely manner. Here the issue was raised by the dissenting judge at the panel level. (Pet. B-19-21) and was subjected to briefing, oral argument, and full treatment by the court of appeals en banc. Although appearing in the court of appeals' opinion as more of a "strong admonition" (Pet. A-70 n. 14) than an "inflexible requirement" (Res. 11), the question expressly reserved by this Court nearly twenty years ago finally is properly presented to this Court.

6. Respondent concedes that three federal circuits (Fourth, Seventh, and Ninth) employ some form of the balancing test.[9] The correct total is four. Citing *United States v. Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994), however, Respondent incorrectly lists the Eighth Circuit as a bad-faith jurisdiction. Actually, the Eighth Circuit began to employ a balancing test even before this Court's decision in *United States v. Lovasco*, 431 U.S. 783 (1977). *United States v. Jackson*, 504 F.2d 337, 339 (8th Cir. 1974) ("balancing the reasonableness of the delay against any resultant prejudice to the defendant"), *cert. denied*, 420 U.S. 964 (1975). After *Lovasco* the Eighth Circuit continued to invoke the balancing test. *United States v. Weaver*, 565 F.2d

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cannot say that the district court abused its discretion in reaching its conslusion in this case." *Id.* at 450.

[9] In conceding the Seventh Circuit, Respondent has changed its position from the one that both it and the court of appeals took below. (Supplemental Reply Brief of Plaintiff-Appellant 2-3; Pet. A-35).

129, 131 (8th Cir. 1977) (citing *Jackson, supra*), *cert. denied*, 434 U.S. 1074 (1978). The rule in the Eighth Circuit is that a panel is bound to follow the decision of an earlier panel, which becomes the law of the circuit. *United States v. Olness*, 9 F.3d 716, 717 (8th Cir. 1993) (only court en banc can overrule earlier panel decision and adopt differing rule of law), *cert. denied*, 510 U.S. 1205 (1994). As the court of appeals recognized in the present case, the *Stierwalt* decision has been ignored in later Eighth Circuit decisions. (Pet. A-36) (citing *United States v. Miller*, 20 F.3d 926, 931 (8th Cir.), *cert. denied*, 115 S.Ct. 226, (1994)). Cases like *Stierwalt* are abberations, which do not create any more of a genuine intracircuit conflict than do the few isolated balancing-test panel decisions in the Tenth and Eleventh Circuits. (Pet. 9 n. 3) The Eighth Circuit employs the balancing test, which makes a total of four circuits, not three as contended by Respondent. Every circuit has settled on a test. Nothing remains but for this Court to resolve the split in the circuits.

CONCLUSION

The petiton for a writ of certiorari should be granted.

Respectfully submitted.

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